Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

ZIA RAZZAQ,

Petitioner,

vs.

OLD DOMINION UNIVERSITY,
ERNEST J. CROSS, JR., and
WILLIAM A. DREWRY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Why did the U. S. District Court of Eastern Virginia in Norfolk allow withholding of evidence by ODU, et al who stone-walled Razzaq's discovery requests first by not responding and subsequently by filing a motion for protective order to stop discovery -- a discovery which did not occur? Is this not a violation of 28 U.S.C. Rule 26?

2. Why did the United States Court of Appeals for the Fourth Circuit concur with the District Court's decision to allow withholding of evidence by ODU, et al?

3. Why did the District Court and Fourth Circuit Court accept false affidavits by ODU, et al and false statements of their attorney from the Attorney General's Office of the Commonwealth of Virginia while not even allowing the discovery process to occur?

4. Why did the District Court violate the First Amendment by repeatedly and forcefully interrupting Razzaq'attorney before he could even finish his sentences during October 14, 1999 hearing? Why did the court disallow the attorney to present his logic in defense of the alleged vicitim of discrimination while allowing the alleged discriminators' attorney to speak freely?

5. Why did the District Court declare the national origin of Oktay Baysal as Indian when he is in reality from Turkey, and then use this as a reason for discrediting one of Razzaq's evidences? Why did'nt the Fourth Circuit Court consider this fact despite Razzaq pointing it out in his brief? Is'nt it an act of racism itself to judge someone's national origin from the name and then take a legal action based on it?

6. Why did the District Court apply Federal Rule of Civil

Procedure 56 while not only denying the discovery process to occur but also regurgitating defendants' attorney's false assertion that there had already been extensive discovery?

7. Why should Rule 56 exist while in direct conflict with Seventh Amendment and while also giving this aspect of the U.S.law a symbolic appearance of a three-legged-cow as illustrated in Appendix E?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears in Appendix A to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication butis not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts:**

Not applicable in this case.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 24, 1999.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 30, 1999, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____(date) on_____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

[ ] For cases from **state courts**:

Not applicable in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 56

Procedural device available for prompt and expeditious disposition of controversy without trial when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only question of law is involved.

28 USC Appendix - Rules of Civil Procedure Rule 26

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents,or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Protective Orders

Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the

court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression,or undue burden or expense,....

Title VII of the Civil Rights Act of 1964

Title VII outlaws discrimination by an employer against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. Section 2000e-2(a)(1). It also prohibits an employer from discriminating against an employee because the employee has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. Section 2000e-3(a).

42 U.S.C. Section 1981

Section 1981 ensures that all persons shall have the same right...to make and enforce contracts, 42 U.S.C. Section 1981(a), defined as the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship, 42 U.S.C. Section 1981 (b).

42 U.S.C. Section 1983

Section 1983 imposes civil liability on any person who, under color of state law, deprives an individual of any rights, privileges, or immunities secured by the Constitution and laws

[of the United States. 42 U.S.C. Section 1983.

First Amendment

Amendment to U.S. Constitution guaranteeing basis freedom of speech, religion, press and assembly and the right to petition the government for redress of grievances. The various freedoms and rights protected by the First Amendment have been held applicable to the states through the due processs clause of the Fourteenth Amendment.

Seventh Amendment

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. This constitutional right of trial by jury is preserved by Fed.R.Civil P. 38.

STATEMENT OF THE CASE

Series of alleged discriminatory actions by ODU, Cross, and Drewry which finally prompted Razzaq's lawsuit

Since joining ODU until 1996, Razzaq experienced not only salary discrimination but also disparate treatment, psychological and physiological harm, threat of expulsion from ODU during an impending budget cut while he was a tenured full professor with teaching and research awards and an international stature in his field. Further, when Razzaq was invited to apply for a White House Fellowship in 1994, Drewry wrote a letter of evaluation to the President's Commission on White House Fellowships containing racially-motivated statements and lies. Later, Razzaq discovered that there was a pattern of discrimination against Asian, Asian-American, and *foreign-born* African-American faculty at ODU particularly in the College of Engineering and Technology and the College of Business Administration. First, a chronological summary of *some* of the alleged acts of discrimination is presented as follows:

In 1982, Drewry recommended starting salary less than Razzaq was offered to continue to teach at the Univeristy of Notre Dame, to discourage him from joining ODU despite strong support of search committee. Razzaq joined ODU nevertheless due to proximity of NASA.

In 1984, Razzaq received Morgan Award for excellence in teaching and research through the Dean's office prior to Cross but Drewry who was chairperson awarded Razzaq a below-average salary raise.

In 1987, Razzaq received a below-average salary raise, despite receipt of eight grants from NASA in five years since 1982,

among the highest teaching ratings, strong publication, etc.

In 1988 and 1989, Razzaq received below-average salary raises despite research grants, excellent teaching ratings, publications, guidance of master's and doctoral dissertations, etc.

In 1990, Razzaq received a below-average salary raise despite a full load, publications, excellent teaching ratings, etc.

In 1992, Razzaq received a below-average salary raise despite a research grant, excellent teaching ratings, publications, etc.

In 1993, Razzaq received a below-average salary raise despite successful completion of continued research project, excellent teaching ratings, publications, etc.

In 1994, Razzaq received a ZERO raise as a tenured full professor - - the only zero raise found in over 20 years of history of the university for a professor with a full load. Another Asian-American tenured full professor with a doctorate from MIT who was on sabbatical was also given a ZERO raise - - no white American full professor has ever been given a zero raise while on sabbatical. Drewry and Cross were preparing the *grounds* for firing Razzaq and two other Asian-American faculty from the department under the guise of an impending multi-million dollor university budget cut. The plan was openly announced in faculty meetings of two departments other than that in which Razzaq served. This created a rather hostile environment for not only these three faculty but also others in the College and ODU. Several witnesses of the elimination plan announcement are willing to testify but did not get a chance due to the summary judgment in this case.

In 1994, Drewry intensified his hostility against Razzaq. Drewry ordered removal of the only telephone in Razzaq's structural

engineering laboratory thus increasing the risk of bodily harm, injury, or possible death to both Razzaq and his students who used heavy equipment and an overhead crane in the laboratory. The absence of a phone from such a laboratory is against normal safety practices and constitutes a grave safety hazard. Drewry told Razzaq that the phone was removed to save money due to the budget crunch and that they will be removed from all labs. The phones were *not* removed from other labs and the one removed from Razzaq's lab was moved to a room smaller than the size of a bathroom in the same vicinity; the small room used by a *white* part-time faculty member already had a phone thus giving him two phones.

In 1994 again, Drewry wrote an extremely negative letter of evaluation for Razzaq to the President's Commission on White House Fellowships containing racially-motivated statements and lies (Exhibit Q-1 in U.S. District Court, Norfolk Division) Examples include Drewry rating Razzaq "Poor" in sixteen different categories in such items as writing, personal integrity and responsibility, leadership, belief in the ideals and principles of the American Government, sense of obligation to community, etc. As if the large list of poor ratings were not enough to destroy Razzaq's credibility, Drewry went an extra mile to attach a typed and signed letter with this evaluation with the following hateful, venomous, and discriminatory remarks:

> "I find it difficult to believe that anyone would actually nominate Zia Razzaq for such an honor. Quite frankly, it is only the facat that he has tenure that he has not been fired."
>
> "Zia doen't really understand the ideas and principles of America and American Government."
>
> "We were wrong in granting him tenure."

"You certainly should not make the same mistake we did. Unfortunately, I can't fire him."

"I find it incredible that I have been asked to and am, in fact, writing this evaluation."

"I recommend that you reject the application of Zia Razzaq."

The same letter contains a number of lies by Drewry about Razzaq's performance which have been rebutted through affidavits and exhibits already on the court files. The President's Commission rejected Razzaq's application and he lost a once in a lifetime opportunity to serve the American people at a level which a nominator unknown to Razzaq thought would have been commensurate with Razzaq's service and accomplishments. Additional details on this topic are contained in Petition for Rehearing En Banc by Razzaq previously submitted to the Fourth Circuit Court.

In 1995 and 1996, Razzaq again received below-average raise despite 100%plus workload, excellent teaching ratings, publications, etc.

In 1996, a few months after Razzaq had filed a complaint in the U.S. District Court of the Norfolk Division against ODU, Cross, and Drewry, he was subjected to yet another act of discrimination - - this time involving physiological harm, documented in previous paperwork on court files. Defendants' action caused Razzaq intense bladder pains, redness in vision, muscular cramps, and chest pain in classrooms while teaching courses scheduled back to back in buildings on opposite sides of Hampton Blvd. Razzaq was assigned four courses to teach in one semester *with three of them scheduled back to back* -- no white professor in the College has been assigned four courses per

semester with regular pay; one white professor is known to have been assigned properly spaced four courses but was paid over-time money upon recommendation by Drewry. Razzaq had to literally run at his highest speed up and down the buildings and across Hampton Blvd whether the traffic lights were red, yellow, or green, often withholding the urge to urinate for long hours, causing the said pain and harm.

These are only examples of discrimination suffered by Razzaq.

Factual and Procedural History

Plaintiff Zia Razzaq is a tenured Full Professor in the Department of Civil and Environmental Engineering at Old Dominion University - - ODU. Razzaq filed a Motion for Judgment in the Circuit Court for the City of Norfolk on April 27, 1998, against three defendants: ODU; Ernest J. Cross, Jr., Dean of the College of Engineering and Technology at ODU; and William A. Drewry, Chairman of the Department of Civil and Environmental Engineering. Cross and Drewry are no longer the respective Dean and Chairman but were during much of the time relevant to Razzaq's suit. Razzaq alleges that his salary is unfairly low due to a series of below-average pay raises between 1984 and 1996. He attributes these low raises to:

(1) defendants' discrimination because of his Pakistani ancestry;

(2) defendants' retaliation for his participation in protected activity: (a) in 1988, Razzaq was subpoenaed to appear as a witness in a foreign-born African-American professor's discrimination suit against ODU; (b) in 1990, he appeared at another foreign-born Asian-origin professor's grievance hearing; and (c) in 1991, he filed a complaint with the ODU Equal Opportunity Office.

Razzaq charged that the actions of defendants ODU, Cross, and Drewry violated three federal statutes: (1) Title VII of the Civil Rights Act of 1964; (2) 42 U.S.C. Section 1981; and (3) 42 U.S.C. Section 1983. He charged that the actions of defendants Cross and Drewry violated Section 1981 and Section 1983. He seeks monetary damages and injunctive relief.

On May 8, 1998, defendants removed this case to federal court, and filed an answer to plaintiff's complaint. On September 16, 1998, defendants filed a motion for summary judgment. On September 30, 1998, Razzaq responded to defendants' motion for summary judgment, and defendants replied to plaintiff's response on October 7, 1998. The court held a hearing on defendants' motion on October 14, 1998. On November 25, 1998, the court granted a summary judgment in response to the defendants' motion - - Appendix B.

On December 8, 1998, the attorney for ODU, Cross, and Drewry filed a motion in the U.S. District Court of the Norfolk Division for Attorney's Fees and a Memorandum of Law in support thereof. On December 21, 1998, Razzaq's attorney filed in the same court a Plaintiff's Response to Defendants' Motion for Attorney's Fee. On February 11, 1999, the circuit court denied defendants' motion for attorney's fee - - Appendix D.

On February 8, 1999, Razzaq filed an Informal Brief -- Additional Supporting Memorandum, in the U.S. Court of Appeals for the Fourth Circuit. On February 16, Razzaq filed a Supplemental Supporting Memorandum in the Fourth Circuit Court. On February 22, 1999, defendants' attorney filed a response to Razzaq's appeal. On March 1, 1999, Razzaq filed an Informal Reply Brief in the Fourth Circuit Court. One June 24, 1999, the Fourth Circuit Court denied Razzaq's petition - - Appendix A. On July 8, 1999, Razzaq filed a Petition for Rehearing En Banc in the Fourth Circuit Court. On August 30,

1999, the Fourth Circuit Court denied Razzaq's petition for rehearing en banc - - Appendix C.

Complaints about alleged discrimination practices at ODU; salary adjustments; settlement attempts with Razzaq and other professors who filed lawsuits

On March 26, 1996, the Asian/Asian-American Advisory Council established by ODU President James V. Koch to advise him on matters related to Asian-origin faculty members issued a report finding patterns of discrimination against Asian-origin faculty in the areas of administrative appointments, promotion and tenure, salary increments and levels, use of a student exit interview form containing a question which denigrates foreign instructors, and faculty evaluation criteria. A copy of this report was submitted to the district court as Exhibit C-2. In September, 1998, a report titled Status of Foreign Born Asian & Foreign Born African American Engineering Faculty at Old Dominion University was prepared for the Asian/Asian-American Faculty Caucus at ODU. This report appears as Exhibit B submitted to the U.S. District Court of the Norfolk Division. The data and analysis presented in this report, including Razzaq's salary as one of the many data points, shows very significant differences in salaries between those of the white faculty and of the Asian-origin professors. The report also describes several other forms of discrimination experienced by the foreign born Asian and foreign born African American faculty.

Razzaq's attorney --Thomas F. Hennessy, filed in the U.S. District Court of the Norfolk Division a Response to Defendants' Motion for Attorney's Fee which contains a detailed account of the hurried last-minute coverups via partial salary adjustments and settlement attempts with Razzaq and other professors who had also filed lawsuits. The following is only a summary from

various documents and exhibits on court files and Hennessy's response:

1. On April 19, 1996, Razzaq sent a letter to ODU Provost Gora complaining that his salary of $56,500 per academic year was the lowest of any full professor in the College. He attributed the low salary to discrimination against him because of his race and national origin.

2. On May 3, 1996, Razzaq instituted an action in the Norfolk's district court styled *Zia Razzaq v. Old Dominion University*, Civil Action No. 2:96cv443.

3. On May 26, 1996, ODU General Counsel Patrick B. Kelly ("Kelly") wrote a letter to Razzaq's counsel Hennessy memorializing a conversation between Kelly and Razzaq that had been initiated by Razzaq. In that letter, Kelly acknowledged that Razzaq informed him that he did not wish to serve ODU with process until the parties had an opportunity to discuss resolution of his claims. Kelly invited Hennessy to contact him.

4. On June 21, 1996 the district court requested that Razzaq's counsel make a written status report concerning the case. At that point, forty-five or more days had passed since the case was filed and the Summons and Complaint had not been served on ODU, et al.

5. On July 12, 1996, Hennessy advised the district court that the parties are currently attempting to resolve their disputes through settlement and therefore would like to defer service of the Complaint and placement of the case on the Court's docket.

6. On July 12, 1996, Hennessy wrote a letter to Kelly stating that "[i]n response to your request that we participate in discussions in effort to resolve Dr. Razzaq's claims, Dr. Razzaq would like

to participate in settlement discussions. Please contact me at your earliest convenience regarding possible settlement of this case."

7. On July 15, 1996, Kelly wrote to Hennessy stating that if the university has failed to treat Dr. Razzaq appropriately, we are very interested in learning from Dr. Razzaq the specific nature of his claims in order that they might be addressed.

8. On September 3, 1996 Hennessy and Kelly met to discuss possible resolution of Razzaq's claims.

9. On September 11, 1996 ODU unilaterally increased Razzaq's salary by $5,000.

10. On October 22, 1996 Hennessy wrote to Kelly acknowledging a prior conversation in which he expressed Razzaq's interest in hearing Kelly's views regarding adjustment of Razzaq's annual salary.

11. On October 22, 1996 *Zia Razzaq v. Old Dominion University*, Civil Action No. 2:96cv443, was dismissed without prejudice.

12. On October 24, 1996 Kelly wrote to Hennessy stating that "our negotiations have a better chance of success since the suit against the university is no longer pending."

13. On November 15, 1996 Kelly wrote to Hennessy acknowledging his proposal that Razzaq and Provost Gora arrange a meeting for the purpose of creating "an opportunity for the university and Dr. Razzaq to reconcile their differences."

14. On December 13, 1996 Provost Gora met with Razzaq to discuss possible resolution of his claims against ODU. During

this meeting, Provost Gora informed Razzaq that ODU was increasing his base salary by an additional $5,000. Between September 11 and December 13, 1996, defendant ODU increased Razzaq's base-rate-of-pay by $12,000.

15. On January 21, 1997 Razzaq re-filed his suit in the Circuit Court for the City of Norfolk. His Motion for Judgment contained the same allegations set forth in *Zia Razzaq v. Old Dominion University*, Civil Action No. 2:96c443.

16. In or around January 1997, defendant Cross resigned from his position of Dean of the College of Engineering and Technology, and appointed to a *newly created* position of Manager of Special Projects. Cross had occupied the Dean's position for nearly thirteen years.

17. On March 3, 1997, Kelly wrote to Hennessy stating that he is "ready to meet with you at any time your schedule will allow to discuss [plaintiff's case] which [has] not yet been served on the University."

18. On March 24, 1997, Hennessy wrote to Kelly affirming that Kelly had "expressed an interest in discussing possible resolution of Razzaq's case..."

19. On May 6, 1997, Kelly wrote to Hennessy in which he stated:

> [b]ased upon our last telephone conversation, it was my understanding that you were going to obtain the credentials and fee schedules, costs, etc. for mediation services with regard to mediation of Razzaq's claim.

20. After further discussion between Kelly and Hennessy concerning settlement of Razzaq's claims, Hennessy contacted

the Center for Dispute Resolution concerning their policies and fee schedules.

21. In June 1997, defendant Drewry was not reappointed to the position of Chair of the Department of Civil Engineering.

22. On August 1, 1997, Hennessy wrote to Kelly stating:

> Over the last several months we have been attempting to schedule a mediation of the above-referenced case. We have deferred effecting service of the Complaint during this period. You have informed me that Dr. Gora must participate in the mediation, and that she will not be available until September. We are unwilling towait until September before effecting service. Accordingly, please be advised that unless the mediation is scheduled to take place on or before August 12, 1997, we will serve the Complaint on August 13, 1997.

23. On August 6, 1997, Hennessy wrote to Kelly stating:

> In our telephone conversation today I informed you that Dr. Razzaq would be willing to defer mediation of his dispute until the first week of September provided ODU agreed to pay all cost associated with mediation. You informed me that this offer was unacceptable. Accordingly we anticipate that we will serve Dr. Razzaq's Motion for Judgment sometime next week. Please call me if you have any questions.

24. On April 21, 1998, Kelly wrote to Hennessy stating:

> As I discussed with you this morning on the telephone, Old Dominion University is interested in mediating its

differences with the Plaintiff in the above-styled suits [including the Razzaq suit]. To this end, it will agree to meet with the Plaintiffs, their counsel and a mediator in formal session, or sessions to work out an agreed settlement of differences.

25. On April 27, 1998, Razzaq took a Nonsuit in his action in Norfolk Circuit Court. On that same day Razzaq refiled this action to the U.S. District Court of the Norfolk Division adding Cross and Drewry as Defendants and adding a claim under Title VII.

26. On May 8, 1998, defendants removed this action to the U.S. District Court of the Norfolk Division.

27. On Saturday, May 9, 1998, Kelly called Hennessy and told him that, in his view, Razzaq and other Plaintiffs who had filed similar claims against ODU had "won" their cases. Kelly told Hennessy that the parties should make every effort to begin substantive discussion concerning appropriate amounts to be paid to Plaintiff Razzaq and other Plaintiffs to settle their claims.

28. On May 12, 1998, Kelly wrote to Hennessy stating:

> This letter is in response to your letter of 6 May 1998 and our telephone discussion last Saturday with regard to the possibility of mediating some of the claims of various Plaintiffs in the above-named suits.
>
> By way of recap, while the University believes that some of ADR would be appropriate with some of the Plaintiffs, it does not believe the complexities of the claims lend themselves to the settlement conference format. On the other hand, the University would be willing to pay eighty percent of the cost of mediation if your clients are

inclined. The total cost of mediation as well as attorney's fees would also be the subject of mediation. For a beginning, the University would like to mediate the separate claims of Demuren, Nguyen and Razzaq.

In a subsequent telephone conversation in May, Kelly agreed that his clients would participate in Settlement Conferences before a United States magistrate judge in the Razzaq case and in other cases brought by foreign-born faculty against ODU.

29. On August 5, 1998, Kelly informed Hennessy that he would be leaving ODU at the end of September and that the Attorney General's office would be taking over the defense of the Razzaq case and other cases brought against OUD by faculty of the College of Engineering and Technology.

30. After Kelly left ODU, Guy W. Horsley, Jr., Esq. became the attorney for ODU, et al in Razzaq's case.

Horsley remained the attorney for ODU, et al until the Fourth Circuit Court denied Razzaq's petition for rehearing en banc on August 30, 1999.

REASONS FOR GRANTING THE WRIT

1. District Court pre-judged Razzaq's case

By disallowing the discovery process to take place, the District Court pre-judged Razzaq's case. Razzaq alleges that this is also a violation of 28 U.S.C. Rule 26. During the October 14, 1999 hearing, the court was not allowing Razzaq's attorney to even complete his sentences - - a direct violation of the First Amendment. Further, the Eighth Circuit has stated that "The prima facie case, in the absence of an explanation from the employer, creates a presumption that the employer unlawfully discriminated against the employee." Moschetti v. Chicago, Central & Pacific Railroad Co. (CCP), No. 96-3792. The Eighth Circuit reversed the judgment and the case was remanded for further proceedings. In Razzaq's case, he gave a timely response to the defendants' interrogatories, however, the defendant refused to respond to all requests for the discovery process to take place. This created a serious disadvantage for Razzaq making the supposed 'explanations' of the defendant *one-sided.* Contrary to the position of the Eighth Circuit, the Fourth Circuit favored the flawed decision of the District Court - - flawed in the sense of not requiring the defendant to respond to the discovery process before making a motion for a summary judgment.

2. District Court trivialized White House Fellowship discriminatory evaluation letter of Razzaq by Drewry

The District Court took the approach of trivializing the materially damaging discriminatory statements in the White House Fellowship evaluation. The Eleventh Circuit has gone on record under a section titled "B. Direct evidence of discrimination" - - Trotter et al av. The Board of Trustees of the

University of Alabama,No 95.6465: "Statements indicating a racial bias on the part of a decisionmaker in an employment setting can constitute direct evidence of racial discrimination in Title VII cases." The Fourth Circuit has also cited in a case - - Taylor and Johnson v. Virginia Union University, Nos. 97-1667 & 97-1669: "discriminatory comments by an executive connected with decision-making process will often be the plaintiff's strongest circumstantial evidence of discrimination" and "they are highly relevant." The Fourth Circuit also cited in the same case: "[D]eragatory remarks indicative of a discriminatory attitude are generally admissible to prove discriminatory treatment."

3. Defendants have no proper explanation for granting a history-making zero salary raise for Razzaq in 1994 and below-average raises in other years

In their affidavits, Cross and Drewry mention that Razzaq was granted low raises since he did not produce external research money in 1992, 1994, 1995, and 1996. ODU's attorney Horsley mentions the same reason also for the year 1997 which is one year *after* Razzaq filed his lawsuit. This explanation by the defendants is completely flawed based on the following grounds:

(a) Razzaq was given below-average raises for so many years prior to 1992, e.g., in 1984 when he received the Morgan Award for excellence in teaching and research and did have external grants to work on NASA space station vibration control, etc. Also, there were years before 1992 when Razzaq had even two external grants in a given year, excellent teaching ratings, etc. but was still given below-average raises by Drewry and Cross.

(b) The ODU Faculty Handbook does not state anywhere that a faculty member must guarantee an external grant each year he is

serving at ODU. In fact it states that faculty purchase release time - - based on external research grants, is not a routine matter. The low and zero raises to Razzaq cannot be justified based on a guaranteed success in each year. Instead, the university salary raise criteria, and those of the College and the Department all have raise allocations for teaching, research, publications, service, etc. Razzaq was given a zero raise during an year when he had published a new theory in a journal paper, received excellent teaching ratings, guided Master's and Ph.D theses, etc. Also, there were numerous white faculty members with no grants who were given regular to very high raises. In one case, a white faculty member with very poor teaching record who was denied tenure was re-hired as a lecturer to teach the same courses and was given nearly three-and-a-half *times* the normal raise.

(4) District Court used false statements and false affidavits by the defendants as a basis for their motion for the summary judgment while disallowing Razzaq the discovery process

As described in the petitions submitted by Razzaq to the Fourth Circuit supported by a number of previously submitted exhibits, both the defendants and their attorney presented false statements and false affidavits to the District Court as a basis for their motion for the summary judgment. The District Court did not properly probe into the validy of the defendants' assertions while simultaneously disallowing Razzaq the discovery process.

(5) District Court exposed its bias by first incorrectly judging Oktay Baysal's country of origin from his name and then using that as a basis for discreding the report prepared for the Asian Caucus used by Razzaq as one of the evidences

Oktay Baysal, a tenured full professor at ODU and born in

Turkey was judged by the District Court as a person of Indian origin. Using its own incorrect interpretation of Oktay Baysal's country of origin, the Court then discredited the report prepared for the Asian Caucus used by Razzaq as one of the evidences.

(6) The District Court misinterpretted and misapplied the Federal Rule of Civil Procedure 56 in Razzaq's case

How can a court justify allowing withholding of the evidence by the defendants on one hand through a protective order, believing in the statements and affidavits of the defendants for their unilateral face value, and then grant them a summary judgment? The court abused and exceeded its power in this case.

(7) Rule 56 should be repealed since it is unjust and in direct conflict with the Seventh Amendment

The U.S. law provides a choice to a plaintiff to chose between a jury-trial or a trial-by-judge provided a summary judgment is not granted at the onset. At the very onset of a case, however, only the judge retains the entire power to either let a case go to trial or be given a summary judgment. Rule 56 is unjust since it can and has been misinterpretted and misapplied by judges thus causing undue grief to possible victims. It is also in direct conflict with the Seventh Amendment. Appendix E presents a symbolic representation of the current law in that it is like a three-legged cow - - the rear two legs represent the two options, namely, jury-trial and trial-by-judge, however, at the front the cow has only one leg representing the judge having the full power. The missing front leg is the needed jury option even for determining whether or not summary judgment should be granted in a given case. Razzaq believes that this is a very major flaw in U.S. Code of law and has contributed to:

(a) inflicting of injustice on the American people;

(b) perpetuation of discrimination since the perpetrators of discrimination know that the odds are against the victim because of this rule; and

(c) gross overloading of work on the appeals courts and the supreme court due to cases which should have been properly and justly resolved at the district court level.

In short, the present law is handicapped just like the three-legged cow - - its legs feel over-burdened, it cannot move around easily, it hurts, and it is inefficient. Razzaq is not a specialist in creating new laws or procedures but would like to suggest the following. Can the Supreme Court help in creating the fourth leg of the law in which even at the onset of a case such as Razzaq's, a plaintiff is given a choice between a jury or a judge before a summary judgment is granted with one compromise: whereas at the trial level one jury deals with one trial, for the pre-summary-judgment hearing one jury may be asked to decide on three or four cases because the preliminary hearings are of generally a short duration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Zia Razzaq
Pro se
4128 Cheswick Lane
Virginia Beach, VA 23455
(757) 683-3762

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

June 24, 1999

TO: Zia Razzaq
Guy Winston Horsley Jr., Esq.

NOTICE OF JUDGMENT

Judgment was entered this date in Case Number(s):
99-1026

The Court's decision is enclosed

PETITION FOR REHEARING (FRAP 40)
PETITION FOR REHEARING EN BANC (FRAP 35)

Filing Time:

A petition must be received in the clerk's office within 14 days after judgment to be timely. There are three exceptions to this rule:

(1) In all civil cases in which the United States or an agency or officer thereof is a party, the time within which a party may seek rehearing shall be 45 days after entry of judgment.
(2) The Court may grant an extension of time or leave to file a petition for rehearing out of time if the party establishes that the delay resulted from the death or serious illness of counsel or a family member (or of a party or family member in pro se cases or other circumstances wholly beyond the control of counsel

APPENDIX A: U.S. Court of Appeals Notice of Judgment

or a party proceeding without counsel.

(3) Prisoner petitions are deemed filed when delivered to prison authorities.

If a petition for rehearing en banc is to be filed, it must be filed at the same time and in the same document as the petitionfor rehearing and must be clearly identified in the title.

Each case number to which the petition applies mustbe listed on the petition, even in companion or consolidated cases. Failure to list the individual case numbers on the petition will result in the unidentified cases proceeding to mandate even if a timely petition for rehearing has been filed in a companion or consolidated case.

A timely filed petition for rehearing of petition for rehearing en banc will stay the mandate and toll the running of time for filing a petition for writ of certiorari.

Purpose:

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. The opinion is in conflict with a decision of the United States Supreme Court, this Court, or another court of appeals, and the conflict is not addressed in the opinion.

4. The proceeding involves one or more questions of exceptional importance.

Statement of Counsel:

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statement.

Form:

The 15 page limit allowed by the Rule shall be observed. The Court requires 4 copies of the petition (20 copies of a petition for rehearing en banc); however, a pro se party who is indigent may file the original only.

BILL OF COSTS (FRAP 39)

Filing:

A party to whom costs are allowed, who desires Time: taxation of costs, shall file a bill of costs on or before 07/08/99.

MANDATE (FRAP 41)

Issuance Time:

Except in original proceedings before this Court when there is no mandate, the mandate is issued 7 days after the expiration of the time for filing a petition for rehearing. A timely

petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay the issuance. If the petition or motion is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay:

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

CRIMINAL JUSTICE ACT

CJA:

Counsel appointed under the Criminal Justice Act must file their vouchers no later than 60 days after final disposition of the case. If no petition for certiorari is filed, the 60 days runs from the date of judgment. If a petition for certiorari is filed, the 60 days runs from the date of filing the petition.

PATRICIA S. CONNOR
CLERK

Enclosure

PER CURIAM:

Zia Razzaq appeals the district court's order granting summary judgment in favor of the Defendants in this civil rights action alleging employment discrimination and retaliation. See 42 U.S.C. § 2000e-2 (1994); see also 42 U.S.C. §§ 1981 & 1983 (1994). We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Razzaq v. Old Dominion University, No. 98-529-2 (E. D. Va. Nov. 30, 1998). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Although the district court's order is marked as "filed" on November 25, 1998, the district court's records show that it was entered on the docket sheet on November 30, 1998. Pursuant to Rules 58 and 79(a) of the Federal Rules of Civil Procedure, it is the date that the oder was entered on the docket sheet that we take as the effective date of the district court's decision. See Wilson v. Murray, 806 F.2d 1232, 1234-35 (4th Cir. 1986).

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1026

ZIA RAZZAQ,

Plaintiff - Appellant,

versus

OLD DOMINION UNIVERSITY: ERNEST J. CROSS, JR.; WILLIAM A. DREWRY,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Rebecca B. Smith, District Judge. (CA-98-529-2)

Submitted: June 17, 1999 **Decided:, June 24, 1999**

Before MURNAGHAN and TRAXLER, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Zia Razzaq, Appellant Pro Se.

Guy Winston Horsley, Jr., Assistant Attorney General, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

ZIA RAZZAQ,

Plaintiff,

ACTION NO. 2:98cv529

v.

OLD DOMINION UNIVERSITY,
ERNEST J. CROSS, JR., and
WILLIAM A. DREWRY,

Defendants

MEMORANDUM OPINION AND FINAL ORDER

This case is before the court on defendants' motion for summary judgment. For the reasons stated below, defendants' motion is GRANTED.

APPENDIX B: U.S. District Court Opinion & Final Order

I. Factual and Procedural History

Plaintiff Zia Razzaq is a tenured Full Professor in the Department of Civil and Environmental Engineering at old Dominion University "ODU"). Plaintiff filed a Motion for Judgment in the Circuit Court for the City of Norfolk on April 27, 1998, against three defendants: ODU; Ernest J. Cross, Jr., Dean of the College of Engineering and Technology at ODU; and William A. Drewry, Chairman of the Department of Civil and Environmental Engineering.[1] Plaintiff alleges that his salary is unfairly low due to a series of below-average pay raises between 1984 and 1996. He attributes these low raises to:

1) defendants' discrimination because of foreign ancestry (plaintiff is Pakistani); and

2) defendants' retaliation for his participation in protected activity. [2]

Plaintiff charges that defendant ODU's actions violated three federal statutes:

1) Title VII of the Civil Rights Act of 1964;

2) 42 U.S.C. § 1981; and

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[1] Defendants Cross and Drewry are no longer Dean and Chair, respectively, but were during much of the time relevant to plaintiff's suit.

[2] Plaintiff's protected activity includes: 1) in 1988, he was subpoenaed to appear as a witness in another professor's discrimination suit against ODU; 2) in 1990, he appeared at another professor's grievance hearing; and 3) in 1991, he filed a complaint with the ODU Equal Opportunity Office.

3) 42 U.S.C. § 1983.[3]

He charges that actions of defendants Cross and Drewry violated Section 1981 and Section 1983. Plaintiff seeks monetary damages and injunctive relief.

On May 8, 1998, defendants removed this case to federal court and filed an answer to plaintiff's complaint. On September 16, 1998, defendants filed a motion for summary, judgment. On September 30, 1998, plaintiff responded to defendants' motion for summary judgment, and defendants replied to plaintiff's response on October 7, 1998. The court held a hearing on defendants' motion on October14, 1998. Accordingly, defendants' motion is ripe for decision.

II. Standard of Review

Summary judgment is appropriate only when the court,

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[3] Title VII outlaws discrimination by an employer "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). It also prohibits an employer from discriminating against an employee because the employee "has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

Section 1981 ensures that all persons "shall have the same right . . . to make and enforce contracts," 42 U.S.C. § 1981(a), defined as "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," 42 U.S.C. § 1981(b).

Section 1983 imposes civil liability on any person who, under color of state law, deprives an individual "of any rights, privileges, or immunities secured by the Constitution and laws [of the United States]." 42 U.S.C. § 1983.

viewing the record as a whole and in the light most favorable to the nonmoving party, finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(C): *see, e.g.,Celotex Corn. v.Catrett*, 477 U.S. 317, 322-24 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Terry's Floor Fashions. Inc. v. Burlington Indus.*, 763 F.2d 604, 610 (4th Cir. 1985). Once a party has properly filed evidence supporting a motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials in the pleadings, but must instead set forth specific facts illustrating genuine issues for trial. Fed. R. Civ. P. 56 (e) *Celotex Corp.*, 477 U.S. at 322-24. Such facts must be presented in the form of exhibits and sworn affidavits. A mere "scintilla of evidence" is not sufficient to withstand a motion for summary judgment. Rather, the evidence must be such that the jury reasonably could find for the nonmoving party. *Anderson*, 477 U.S at 252. In a discrimination case, a court must take special care when considering a summary judgment motion because motive is often the critical issue. However, summary judgment is still appropriate if the plaintiff cannot prevail as a matter of law. *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 958-59 (4th Cir. 1996).

III. Analysis

In their motion for summary judgment, defendants not only challenge the merit of plaintiff's case, but also claim to be immune from suit under 42 U.S.C. § 1981 and § 1983, and argue that plaintiff's claim is untimely.

A. Defendants' Immunity from Suit Under Section 1981 and Section 1983

The Eleventh Amendment to the United States Constitution prohibits suits against state actors by individuals in federal court, absent consent or Congressional abrogation. U.S. Const. amend XI; *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996). Supreme Court has recognized Congressional abrogation of Eleventh Amendment immunity for suits under Title VII, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), but not for suits under 42 U.S.C. Section 1983, *Quern v. Jordan*, 440 U.S. 332 (1979). With respect to suits under 42 U.S.C. § 1981, this court concurs with the view held by a number of other federal courts that Eleventh Amendment immunity also is not abrogated.[4] Like § 1983, § 1981 lacks requisite clear congressional intent to abrogate.[5] Moreover, in *Seminole Tribe*, the Supreme Court held

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[4] *See e.g., Freeman v. Michigan Dep't of State*, 808 F.2d 1174, 1178-79 (6th Cir. 1987); *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982); *Sessions v. Rusk State Hosp.*, 648 F.2d 1066, 1069 (5th Cir. Unit A June 1981); *Carmen v. San Francisco Unified Sch. Dist.*, 982 F. Supp. 1396, 1403 (N.D. Cal. 1997); *Chinn v. City Univ. Sch. of Law at Queens College*, 963 F. Supp. 218, 224 n.1 (E.D.N.Y. 1997); *Tang v. Rhode Island Dep't of Elderly Affairs*, 904 F. Supp. 55, 63 (D.R.I. 1995); *Kahn v. Maryland*, 903 F. Supp. 881, 888 (D. Md. 1995); *Toney v. Alabama*, 784 F. Supp. 1542, 1544-45 (M.D. Ala. 1992) ; *Baker v. Board of Regents*, 721 F. Supp. 270, 273 (D. Kan. 1989); *Davis v. Buffalo Psychiatric Ctr.*, 623 F. Supp. 19, 20 (W.D.N.Y. 1985); *Woods v. Missouri Dep 't of Mental Health, Kansas City Reg'l Diagnostic Ctr.*, 581 F. Supp. 437, 441 (W.D. Mo. 1984).

[5] Congress's intent to abrogate "must be obvious from 'a clear legislative statement.'" *Seminole Tribe*, 517 U.S. at 55 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991)). In *Quern*, the Court noted that Section 1983 "does not explicitly and by clear language indicate on its face" an intent to abrogate Eleventh Amendment immunity, nor does its history clearly indicate such an intent. *Quern*, 440 U.S. at 345; *cf. Seminole Tribe*, 517 U.S. at 56-57 (holding that Congress expressed a clear intent to abrogate in the Indian Gaming Regulation Act by repeatedly referring to "State" in the text of the Act). The language of Section 1981 does not apply to states any more clearly than does the language of Section 1983. Moreover, courts exploring the legislative history of Section 1981 have found, as with

that Congress may abrogate Eleventh Amendment immunity only for causes of action create, pursuant to § 5 of the Fourteenth Amendment. Congress originally passed § 1981 pursuant to the Thirteenth Amendment. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-4371 (describing th legislative history of the Civil Rights Act of 1866, a portion of which is now § 1981) .In light of the absence of Congressional abrogation of immunity, and since there is no evidence of consent in this case, defendants are immune from suit under both § 1981 and § 1983, if they qualify as state actors under the Eleventh Amendment.

With respect to defendant ODU, a number of circuits have ruled that state colleges and universities are agents of the state, thus immune from suit under the Eleventh Amendment. *University of Iowa*, 90 F.3d 271, 275 (8th Cir.), *cert. denied*, 117 S. Ct. 1082 (1996); *Watson v. University of Utah Med. Ctr.*, 75 F.3d 569, 575 (10th Cir. 1996); *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470,1 491, (3d Cir.), *cert.denied*, 444 U.S. 832 (1978). In accordance with these decisions, this court holds that ODU is immune from suit under 42 U.S.C § 1981 and § 1983. Thus, the only statutory basis under which ODU may be held liable to plaintiff is Title VII.

With respect to defendants Cross and Drewry, the Supreme Court has held that the Eleventh Amendment does not bar suits in federal court seeking to impose personal liability on individual state officials. *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1973). The Court does recognize "qualified immunity" from suits for damages for the actions of government officials that do not "violate clearly established statutory or constitutional rights of which) a reasonable person would have known. *Harlow v.*

Section 1983, no clear indication of a congressional intent to abrogate Eleventh Amendment immunity. *See, e.g., Daisernia v. New York*, 582 F. Supp. 792, 801-03 (N.D.N.Y. 1984).

Fitzgerald, 457 U.S. 800, 818 (1982). In applying *Harlow*, the Fourth Circuit has stated that a key determination is "whether the rights alleged to have been violated were clearly established at the time of the challenged actions." *Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th) Cir. 1995). "Where the law is clearly established, and where no reasonable [official could believe he was acting in accordance] with it, qualified immunity will not attach." *Id.*

There is no question that the protections afforded individuals) under 42 U.S.C. § 1981 and § 1983 are clearly established. Defendants Cross and Drewry also cannot possibly argue that if they did, in fact, discriminate against plaintiff on account of his nationality or retaliate against him for his protected activity, they were unaware that such actions violated federal law. Therefore, if plaintiff's allegations regarding defendants' action are true, defendants Cross and Drewry do not enjoy qualified immunity for those actions, and are subject to suit under § 1981 and § 1983.

B. Timeliness of Plaintiff's Claims

Defendants argue that the applicable statutes of limitation bar plaintiff's suit under Title VII, 42 U.S.C. § 1981, U.S.C., and § 1983. They allege that each annual adjustment to plaintiff's salary constituted an identifiable act triggering the limitations period for a discrimination complaint. Because the most recent salary adjustment about which plaintiff complains took place in 1996, defendants assert that plaintiff's claim is time-barred.

1. Title VII Claim Against ODU

Since the Virginia Council on Human Rights is a "deferral agency," a Title VII claim arising in Virginia must be filed with the Equal Employment Opportunity Commission

("EEOC") within 300 days of the allegedly discriminatory action, else it is barred.[6] 42 U.S.C. § 2000e-5(e); *Tinsley v. First Union Nat'l Bank*, 155 F.3 *Id.* 435, 442 (4th Cir. 1998). If the EEOC takes no action, the complainant then must file suit within 90 days.[7] 42 U.S.C § 2000e-5(f). Plaintiff filed a charge with the EEOC regarding the alleged incidents of discrimination in his complaint on February 3, 1998. Accordingly, only those incidents occurring after April 9, 1997, may form the basis of his Title VII claim.

However, plaintiff argues that discriminatory compensation constitutes a continuing violation. The Supreme Court has issued somewhat conflicting opinions on this issue. In *United Air Lines. Inc. v. Evans*, 431 U.S. 553 (1977), the Supreme Court refused to regard the present effect of a past discriminatory act as a continuing violation. The discriminatory act at issue in *Evans* was United Air Lines' discharge of flight attendant Evans in 1969 because she married. United rehired Evans in 1972, but for seniority purposes, treated her as if she had not worked for United prior to 1972. Evans sued under Title VII, claiming that United's seniority system gave present effect to a past act of discrimination. The Court held that United's seniority system was "neutral in its operation," and that since Evans failed to file a claim within the limitations period after her discharge in 1968, "United was entitled to treat that past act as lawful. *Evans*, 431U.S. at 558.

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[6] More precisely, a plaintiff, like Mr. Razzaq, who first files a charge with the EEOC, rather than the Virginia Council on Human Rights, should do so within 240 days of the discriminatory action. Filing within 240 days ensures that, in the event that the charge is referred to the Virginia Council on Human Rights and the Council takes the full 60 days available to it to review the charge, see 42 U.S.C. 5 2000e-5(c), the charge will come back to the EEOC within the 300-day limit. *Tinsley*, 155 F.3d at 439.

[7] In this case, plaintiff filed his court action within the 90-day period.

On the other hand, in *Bazemore v. Friday*, 478 U.S. 385 (1986) the Supreme Court held that past discrimination continuing to affect a plaintiff's current salary was actionable as a continuing violation. In *Bazemore*, employees of the North Carolina Agricultural Extension Service filed a discriminatory compensation claim. Prior to the passage of the Civil Rights Act of 1964, the Extension service maintained separate white and black branches. The branches merged in 1965, but some pay disparities between white and black employees remained at the time of the suit. The Extension Service, relying on *Evans*, argued that since Title VII did not become applicable to public employers until 1972, and since it stopped segregating employees in 1965, plaintiffs failed tostate an actionable claim. The Court rejected the Service's argument. It held that "[w]hile recovery may not be permitted for pre-1972 acts of, discrimination, to the extent, that this discrimination was perpetuated after 1972, liability may be imposed." *Bazemore*, 478 U.S. at 395. The Court explained that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96.

The Fourth Circuit applied the *Bazemore* holding in *Brinkley-Obu v.Hughes Training Inc.*, 36 F.3d 336 (4th Cir. 1994), a gender discrimination case. The defendant in *Brinkley-Obu* argued that the last act of discrimination alleged by the plaintiff occurred outside of the limitations period, and that the plaintiff's low salary was simply a continuing effect of that past discrimination. The Fourth Circuit, relying on Bazemore rather than Evans, rejected the defendant's argument and held that the plaintiff's' discriminatory compensation was a continuing violation. *Id.* at 346-47.

In response to plaintiff's continuing violation claim in this

case, defendants cite *Williams v. Enterprise Leasing Co.*, 911 F. Supp.98 (E.D. Va. 1995), which articulated a test for the continuing violation doctrine.[8] According to *William*, determining whether a continuing violation exists, a court should analyze three factors: 1) whether the alleged acts constitute the same type of discrimination; 2) whether the alleged acts are frequent; and 3) whether the alleged acts "have a degree of permanence which would trigger an employee's awareness and duty to assert his or her rights." *Id.* at 996. The first two factors amount to a prerequisite that the defendant's alleged actions constituted a pattern or practice of discrimination. *Id.* The third factor requires that the plaintiff lacked notice of the defendant's discriminatory intent such that the plaintiff would not be expected to have brought a claim in closer proximity to the discriminatory incidents. *Id.* Defendants rely on the third factor, arguing that plaintiff clearly had notice of his rights as early as 1991, when he filed a complaint with ODU's Equal Opportunity Office. However, the complaint in *Williams* is distinguishable from the discriminatory compensation complaints in *Bazemore*, *Brinkley-Obu*, and this case. The plaintiff in *Williams* alleged failure to promote and racial harassment, relying on incidents that occurred outside of the limitations period. According to *Bazemore* and *Brinkley-Obu*, discriminatory compensation is a continuing violation, and each pay check constitutes an actionable event. Thus, if plaintiff can show that his salary remains low today because of discriminatory and retaliatory pay

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[8] The *Williams* test was originally set out by the Fifth Circuit in *Berry v. Board of Supervisors of Louisiana State Univ.*, 715 F.2d 971 (5th Cir. 1983), and a number of other circuits have adopted it. *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 n.9 (3d Cir. 1995); *Martin v. Nannie and the Newborns. Inc.*, 3 F.3d 1410, 1415 (10th Cir. 1993); *Selan v. Kiley*, 969 F.2d 560, 565 (7th Cir. 1992); *Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33*, 921 F.2d 396, 401-02 (1st Cir. 1990); *Roberts v. Gadsen Mem'l Hosp.*, 835 F.2d 793, 800, amended on other grounds, 850 F.2d 1549 (12th Cir. 1988).

increases throughout the past decade then plaintiff's claim is timely, even though such increases took place outside of the limitations period.

In addition to his continuing violation argument, plaintiff asserts that because defendants engaged in a pattern and practice of discrimination, he does not have to allege a discriminatory act within the limitations period. This argument is irrelevant because, as discussed below, an individual plaintiff may not bring a pattern and practice claim.

2. Section 1981 and 1983 Claims Against Cross and Drewry

Claims under § 1981 and § 1983 are subject to the state of Virginia's two-year statute of limitations for personal injury claims. Va. Code Ann, § 8.01-243 (Michie 1998) (setting a two-year statute of limitations for personal injury claims); *Wilson v. Garcia*, 471 U.S. 261, 276 (1984) (holding that the statute of limitations for § 1983 claims corresponds with the state statute of limitations for personal injury claims); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 275 (4th Cir. 1976) (holding that the state statute of limitations for personal injury claims applies to Section 1981 claims, as well). Plaintiff filed this law suit on April 27, 1998.[9] Thus, defendants contend that only those

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[9] Paintiff argues that for purposes of determining the timeliness of his claims, the filing date should be January 22, 1997. According to an affidavit by plaintiff's attorney, plaintiff filed a § 1981 claim against defendant ODU in Virginia Circuit Court on January 22, 1997. On February 4, 1998, plaintiff moved to amend his complaint to add defendants Cross and Drewry. Subsequent to plaintiff's motion to amend, he filed a motion for nonsuit, pursuant to Va. Code § 8.01-380 (Michie 1992), which was granted. On April 27, 1998, plaintiff instituted the current action in Circuit Court for the City of Norfolk. Virginia law provides that if a plaintiff takes a nonsuit pursuant to § 8.01-380, the statute of limitations, which is tolled by the commencement of the original action, remains tolled for six months. Va. Code § 8.01-229E (3) (Michie 1998). Since plaintiff refiled within six months of his nonsuit, he

incidents occurring after April 27, 1996 may form the basis of plaintiff's § 1981. and § 1983 claims.

However, plaintiff asserts that the continuing violation argument he raised with respect to the timeliness of his Title VII claim also applies to his § 1981 and § 1983 claims. The Fourth Circuit has applied the continuing violation doctrine to § 1981 claims. *Williams v. Norfolk & W. Ry. Co.*, 530 F.2d 539 (4th Cir. 1975). While *Williams* did not expressly extend the continuing violation doctrine to § 1983 claims, it is logical that if the doctrine applies to § 1981 claims, it should apply to § 1983 claims, as well. Therefore, because plaintiff's discriminatory compensation claim constitutes a continuing violation, pursuant to *Bazemore* and *Brinkley-Obu*, plaintiff's low salary raises, whether within or outside of the limitations period, may form the basis for his Title VII, § 1981, and § 1983 claims.

C. Merit of Plaintiff's Claims

The burden of proof on a plaintiff in an employment discrimination case is the same for claims under Title VII, 42 U.S.C. § 1981., and 42 U.S.C. § 1983. *Patterson v. McLean*

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argues that the statute of limitations on his claims remained continuously tolled since the filing of his original claim on January 22, 1997, so any incident occurring within two years of that date, not April 27, 1998, should be regarded as timely.

However, plaintiff's January 22, 1997, claim alleged a violation of only Section 1981. His Section 1983 claim against defendants Cross and Drewry was not raised until his April 27, 1998, complaint. Moreover, the January 22, 1997, complaint did not name Cross and Drewry as defendants. Plaintiff failed to indicate the outcome of his February 4, 1998, motion to amend, but that date is the earliest on which Cross and Drewry could have been parties to plaintiff's suit. The statute of limitations with respect to plaintiff's claims against Cross and Drewry would not have been tolled until they were named in the suit.

Credit Union, 492 U.S. 164, 186 (1989) (applying the standard for Title VII claims to claims under § 1981); *Abasiekong v. City of Shelby*, 744 F.2d 1055, 1058 (4th Cir. 1984) (holding that § 1981 and § 1983 claims are reviewed under the same framework as Title VII claims). A plaintiff may satisfy that burden on summary judgment by offering direct evidence of an intent to discriminate, or indirect evidence pursuant to the three-part framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 959 (4th Cir. 1996).

In the Fourth Circuit, direct evidence of discrimination is either direct evidence of a stated purpose to discriminate, or circumstantial evidence of sufficient probative force to raise a genuine issue of material fact.[10] *Evans*, 80 F.3d at 959; *Goldberg v. B.Green & Co., 836 F.2d 845. 848 (4th Cir. 1988)*; *cf. Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 240, 242 (4th Cir. 1982) (discussing the sufficiency of direct evidence of discrimination in context of a directed verdict).The plaintiff's "own naked opinion, without more," is not enough to establish

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[10] Other circuits place stricter requirements on what a plaintiff may introduce as direct evidence of discrimination. The Fifth, Seventh, and Eleventh Circuits all adhere to the rule that to constitute direct evidence of discrimination, the evidence must show the defendant's discriminatory intent without resort to inference or presumption. *Portis v. First Nat'l Bank*, 34 F.3d 325, 328-329 (5th Cir. 1994); *Randle v. LaSalle Telecomms., Inc.*, 876 F.2d 563, 569 (7th Cir. 1989); *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 774 (11th Cir. 1982). An example of such evidence is a "statement or written document showing a discriminatory motive on its face." *Portis*, 34 F.3d at 329 (citing *Miles v. M.N.C. Corp.*, 750 F.2d 867, 870 (11th Cir. 1985)). In addition, the Seventh and Tenth Circuits require that the evidence relate directly to the adverse action at issue in plaintiff's claim. , 876 F.2d at 569; *Furr v. AT&T Techs., Inc.*, 824 F.2d 1537, 1549 (10th Cir. 1987); *see also Hodges v. Stone Savannah River Pulp & Paper Corp.*, 892 F. Supp. 1571, 1577 (S.D. Ga. 1995).

a genuine issue of fact. *Goldberg*, 836 F.2d at 848; *see also Evans*, 80 F.3d at 959 (quoting *Goldberg*).

Under the McDonnell Douglas framework, the burden is on the plaintiff initially to establish a prima facie case of discrimination by presenting some evidence showing a connection between his status as a member of a protected class and an adverse employment action. *Autry v. North Carolina Dep't of Human Resources*, 820 F.2d 1384, 1385 (4th Cir. 1987). Plaintiff's burden is "not onerous." *Texas Dep't of Community Affairs v. Burdine*, 450 248, 253 (1981).

Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to demonstrate a non-discriminatory reason for the adverse action. A defendant's explanation must be supported by evidence. Mere allegations in the pleadings or arguments of counsel are insufficient. *Id.* at 254-55.

Finally, if the defendant offers a nondiscriminatory explanation, the burden shifts back to the plaintiff to show that defendant's explanation is a mere pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 802-04I Under the Fourth Circuit's "pretext-plus" standard, to survive a motion for summary judgment, a plaintiff must do more then simply challenge the truthfulness of the defendant's explanation. Rather, he must offer some evidence that discrimination was the defendant's actual motivation. *Vaughan v .Metrahealth Cos.*, 145 F.3d 197, 202 (4th Cir. 1998); see also *Gillins v. Berkeley Elec. Coop.. Inc.*, 148 F.3d 413, 417 (4th Cir. 1998) (holding that a plaintiff must offer evidence "both that the proffered, nondiscriminatory reason is false and that race discrimination is the 'real reason'" for the adverse action). In reviewing a university employer's non-discriminatory explanation, a court should exercise particular care because professorial employment

decisions "necessarily involve 'subjective and scholarly judgments.'" *Jiminez v. Mary Washington College*, 57 F.3d 369, 376 (4th Cir. 1995).

Plaintiff argues that he does not need to proceed under the proof framework outlined above because he alleges that defendants engaged in a pattern and practice of discrimination. Pattern and practice claims follow the procedure outlined by the Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). However, the Fourth Circuit has held that individual, as opposed to class action, plaintiffs may not state a pattern and practice claim. *Lowery v. Circuit City Stores. Inc.*, 1998 WL 612926, *16 (4th Cir. 1998) ("[I]ndividuals do not have a private, non-class cause of action for pattern or practice) discrimination under § 1981 or Title VII."). Accordingly, plaintiff must present either direct evidence of discrimination, or meet the criteria of the McDonnell Douglas framework, to avoid summary judgment in favor of defendants.[11]

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[11] The court notes that plaintiff's pattern and practice evidence is insufficient as direct or indirect evidence of individual discrimination against plaintiff. Plaintiff's pattern and practice evidence consists of two reports: a 1996 Asian/AsianAmerican Council report examining possible discriminatory treatment of Asian-American professors at ODU; and a September, 1998 report, prepared by plaintiff, titled "Status of Foreign Born Asian & Foreign Born African American Engineering Faculty at Old Dominion University."

It is not clear that either of these reports are admissible, since plaintiff fails to establish that they fall under the hearsay exception for public records. In any event, even if both reports are admissible, they have little value as evidence of discrimination in plaintiff's case.

The 1996 report concludes that Asian-American faculty in the College of Engineering are treated differently than Caucasian professors with respect to promotion decisions and salary. However, the report fails to account for salary differences due to administrative appointments, and it fails to establish that allegedly lesser paid professors are similarly-situated to their higher-paid comparators.

The 1998 report is even more suspect. It concludes that the salaries of foreign born Asian- and African-American professors are lower than the

1. Discriminatory Compensation

The only allegedly direct evidence of discrimination that plaintiff produces is a negative evaluation of plaintiff that defendant Drewry wrote in conjunction with plaintiff's application to the White House Fellowship Program.In his evaluation, Drewry rated plaintiff very critically in a number of categories, including intellectual ability, personal integrity, responsibility, leadership, and civic-mindedness.In an attached statement, Drewry wrote that plaintiff "doesn't really understand the ideas and principles of America and the American Government." Plaintiff argues that this statement demonstrates Drewry's bias against him because of his foreign nationality. However, plaintiff's argument ignores the context in which the statement was made. One of the criteria upon which an evaluator was supposed to base his or her evaluation of an applicant for the White House Fellowship Program was the following: "Believes firmly in ideals and principles of American Government." Given this context Drewry's statement raises no reasonable inference of discriminatory animus.

Since plaintiff fails to introduce any further direct or circumstantial evidence of discrimination, he must rely on the

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salaries of Caucasian professors. The report notes that the average period of elapsed time since receiving a Ph.D. was the same for both groups, and it documents a number of other areas in which foreign born Asian- and African-American professors outperformed Caucasian professors, including doctoral degree production, journal paper publication, and teaching quality. However, the report fails to address all of the factors that determine ODU faculty salaries, including research grant productivity, purchase release time, and university and community service. More significantly, at least two of the faculty included in the report's "Caucasian" category are of foreign descent: Dr. Kandil, who is of Egyptian descent, and Dr. Baysal, who is of Indian (Asian) descent. By including foreign professors in the pool of "Caucasian" professors, plaintiff seriously undermines the report's validity, both in general, and as evidence in plaintiff's case.

McDonnell Douglas framework to avoid summary judgment in favor of defendants.) To establish a prima facie case of discriminatory compensation, a plaintiff must show that, as a member of a protected class, he was paid less than a similarly-situated employee who is not a member of a protected class. *Cf. Brinkley-Obu* , 36 F.3d at 343 (gender discrimination case).

Plaintiff's only evidence in support of his prima facie case is his below average salary increases for the 1984-1985 academic year and for every academic year from 1987-1988 through 1996-1997, despite what he asserts to be an excellent academic record.[12] He notes, in particular, that he received a below average raise in 1984, despite the fact that he received a Morgan Award for teaching and research excellence, and that he received a zero-percent increase in 1994.

Plaintiff alleges that his salary increases were below those of similarly-situated Caucasian professors, but he names only one specific comparator - defendant Drewry. He argues that Drewry's academic record is inferior to his, yet Drewry received greater increases over the same period of time. However, the only specifics that plaintiff alleges about Drewry's record is the fact that he has not published a refereed journal paper in 18 years, has produced only one Ph.D. since 1976, and has a "poor research grants record." Moreover, Drewry is an inappropriate comparator. He is, not similarly-situated to plaintiff because of his administrative position as Department Chair.

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[12] In his affidavit, plaintiff merely states that his raises were "below-average." He does not provide specific, numerical evidence showing the degree to which his raises fell below the Department average.

Assuming that the mere fact that plaintiff's salary increases were below average is sufficient to establish a prima facie case of discrimination, defendants counter with a non-discriminatory explanation for his low increases.Defendants assert that plaintiff's low research grant productivity and his low level of service accounted for his low salary increases throughout the last decade. Plaintiff does not deny that research grants and service are criteria for determining salary increases. Furthermore, plaintiff does not deny that he produced no external research money in 1992, 1994, 1995, 1996, or 1997, or that he had only one research contract for $20,000 in the three years prior to 1990.

Evaluations of plaintiff's performance by former Department Chair in 1989 and 1990 cited the same deficiencies in plaintiff's research productivity. Plus, those evaluations encouraged plaintiff to pursue more, University and external service opportunities. Plaintiff's own resume further supports defendants assertions. While it notes a recent research grant of $251,000, the only other grants it lists during the 1990's are a $93,000 grant in academic year 1992-1993, and a $9,200 grant in 1995.

Plaintiff attempts to rebut defendants' explanation through his personal assessment of his professional credentials. His resume lists a number of publications and awards, including listing in *Who's Who Among America's Teachers* in 1996 and 1998, his receipt of the Morgan Award in 1984. However, plaintiff fails to counter, defendants' assessment, of his research grant productivity and his inferior service record. Plaintiff does note that those criteria are only partially determinative of a professor's salary increases, and he argues that other areas of his performance, including, teaching, have always been reviewed

positively.[13] However, plaintiff produces no evidence showing that, taking into consideration *all* of the Department's salary criteria - both those for which plaintiff received positive reviews and those for which his reviews were negative - his salary increases were unfairly low.[14] In short, plaintiff fails to raise a genuine issue of fact as to either the truthfulness of defendants' nondiscriminatory explanation, or the true motivation for plaintiff's low salary increases. Thus, summary judgment as to plaintiff's discrimination claim is appropriate.

2. Retaliation

Plaintiffs presents no direct evidence to support his allegation that defendants retaliated against him for his participation in protected activity by granting him unfairly low

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[13] In his affidavit, plaintiff takes issue with the emphasis that the College of Engineering places on purchase release time, and he indicates that teaching success should play a more prominent role in determining salary. These arguments obviously do not form the basis for a discrimination claim.

[14] Plaintiff alleges that a statistical analysis of salaries in the College of Engineering reveals that his salary is $5375 lower than it should be, based upon all of the College's salary criteria, and that defendant Drewry's salary is $3894 too high. Plaintiff provides no foundation for this study, other than stating that the current Dean of the College initiated the analysis. Moreover, even if one accepts the study's validity, it fails to raise a genuine issue of fact with regard to the true explanation for plaintiff's low salary increases. Plaintiff fails to demonstrate that the study used the same factors that the Department of Civil Engineering uses to compute salary increases, or that the study attached the same weight to each factor. In addition, the difference between Drewry's actual and predicted salaries barely exceeds the study's standard deviation of $3851, and plaintiff's predicted salary exceeds the standard deviation by only $1500. Thus, the statistical significance of the study's findings as to plaintiff's salary is negligible, at best, and the study's findings as to Drewry's salary lack statistical significance.

salary increases. Consequently, plaintiff must establish his retaliation claim pursuant to the *McDonnell Douglas* framework. To establish a prima facie case of retaliation, plaintiff must show that 1) he engaged in protected activity, 2) he experienced some adverse action, and 3) there is a causal connection between the adverse action and the protected activity. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985).

Plaintiff's participation in his colleague's actions in 1988 and 1990, and his own complaint in 1991, appear to qualify as protected activity. Plus, his low salary increases qualify as an adverse employment action. However, plaintiff fails to establish a causal connection between his protected activity and his low salary increases. Plaintiff's only evidence of a link between his salary increases and his protected activity is their temporal proximity.[15] The Fourth Circuit has held that temporal proximity is sufficient to establish a prima facie case of retaliation, *Williams v. Cerberonics*, Inc., 871 F.2d 452, 457 (4th Cir. 1989). However, according to plaintiff's own affidavit, he began receiving lower than average salary increases as early as 1984, and the string of low increases stretching from 1987 until 1996 began before any of the protected activity he cited in his complaint occurred., Plaintiff alleges that. the discrimination against him intensified after his colleagues' cases and his own complaint, but he fails to explain how the discrimination intensified.

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[15] Plaintiff also argues that a comparison that defendant Cross drew between two of plaintiff's colleagues' discrimination complaints demonstrates the causal connection between plaintiff's low salary and his protected activities. However, such a statement supports absolutely no reasonable inference of retaliatory motive, in general, and has nothing to do with plaintiff or his complaints, specifically.

Even if plaintiff's evidence does establish a prima facie case of retaliation, plaintiff again fails, to rebut defendants' nondiscriminatory explanation for his low salary increases, discussed above. He offers no evidence either that defendants' explanation is untrue, or that defendants' actual motivation was retaliation. Therefore, summary judgement as to plaintiff's retaliation claim is appropriate, as well.

IV. Conclusion

Because of defendant ODU's immunity to suit under 42 U.S.C. 1981 and § 1983, plaintiff may bring only his Title VII claim against ODU. He may bring his § 1981 and § 1983 claims against defendants Cross and Drewry. Plaintiff's claims are not time-barred because discriminatory and retaliatory compensation constitute continuing violations. However, plaintiff presents no direct evidence to support his discriminatory and retaliatory compensation claims, and his indirect evidence pursuant to the *McDonnell Douglas* framework fails to raise a genuine issue of material fact. Therefore, defendants motion for summary judgment is GRANTED.

The Clerk is DIRECTED to send a copy of this Memorandum Opinion and Final order to counsel for the parties.

IT IS SO ORDERED.

/s/ Rebecca Beach Smith
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
November 25 , 1998

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
LEWIS F. POWELL, JR. U. S. COURTHOUSE ANNEX
1100 EAST MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219-3517

Patricia S. Connor
Clerk

Telephone
(804) 916-2700

August 30, 1999

Zia Razzaq
4128 Cheswick Lane,Virginia Beach, VA 23455

Guy Winston Horsley Jr., Esq.
OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA
900 East Main Street, Richmond, VA 23219

Re: 99-1026 Razzaq v. Old Dominion Univ
CA-98-529-2

Dear Counsel and Appellant:
Enclosed is a copy of an order filed today in this case.

Yours truly,
PATRICIA S. CONNOR
Clerk

/s/ Michael Radday
By:_____
Deputy Clerk

Enclosure(s)
cc: Norman H. Meyer Jr

APPENDIX C: U.S. Court of Appeals Denial

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 30, 1999

No. 99-1026
CA-98-529-2

ZIA RAZZAQ

Plaintiff - Appellant

v.

OLD DOMINION UNIVERSITY; ERNEST J. CROSS, JR.; WILLIAM A. DREWRY

Defendants - Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT Of VIRGINIA
NORFOLK DIVISION

ZIA RAZZAQ,
Plaintiff,

FEB 13 1999

v.

ACTION NO. 2:98cv529

OLD DOMINION UNIVERSITY,
ERNEST J. CROSS, JR., and
WILLIAM A. DREWRY,
Defendants.

OPINION AND ORDER

This case is before the court on defendants' motion for attorney's fees. For the reasons stated below, defendants' motion is DENIED.

I. Factual and Procedural History

Plaintiff, a professor at Old Dominion University "ODU" originally filed this action in Circuit Court for the City of Norfolk on April 27, 1998. He alleged salary discrimination on account of his foreign ancestry and retaliation for protected activity, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and 42 U.S.C. § 1983. On May 8, 1998 defendants filed a notice of removal, and on September 16, 1998, they filed a motion for summary judgment. After a hearing on defendants' motion on October 14, 1998, the court granted summary judgment by order dated November 25, 1998.

APPENDIX D: U.S. District Court Opinion & Order Denying Defendants' Motion for Attorney's Fees

Defendants filed a motion for attorney's fees on December 9, 1998. They seek $5,000. Plaintiff responded on December 21, 1998. Accordingly, this matter is ripe for decision.

II. Analysis

Title VII provides that "[i]n any action or proceeding under [Title VII,] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." 42 U.S.C. § 2000e-5(k). Similarly, 42 U.S.C. § 1988 provides for the recovery of attorney's fees by the prevailing party in a suit brought under Section 1981 or Section 1983. While neither attorney's fees provision distinguishes between plaintiffs and defendants, the Supreme Court has held that the standard for awarding attorney's fees to a victorious defendant is higher than the standard for awarding fees to a victorious plaintiff. To award attorney's fees to a victorious defendant under either Title VII or § 1988, a court must find that the plaintiff's case was "frivolous, unreasonable, or groundless." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (Title VII case); *see also Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (per curiam) (applying the *Christianburg Garment* standard to § 1988, as well). The decision to award attorney's fees is reviewed under the abuse of discretion standard. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

The Fourth Circuit has upheld attorney's fees awards to victorious defendants in civil rights cases lacking any evidence, other than speculation or conjecture on the part of the plaintiff, of improper motives. *See, e .g., Hutchinson v. Staton*, 994 F. 2d 1076, 1080-81 (4th Cir. 1993); *Introcaso v. Cunningham*, 857 F.2d 965, 969 (4th Cir. 1988): *Arnold v. Burger King Corp.*, 719 F.2d 63, 66-67 (4th Cir. 1983). On the other hand, a discrimination claim supported by mere circumstantial evidence nonetheless may fail to constitute a groundless suit. *See, e.g.,*

Glymph v. Spartanburg Gen'l Hosp., 783 F.2d 476, 480 (4th Cir. 1986). The Fourth Circuit also has identified a number characteristics of plaintiffs' cases justifying an award of attorney's fees under the *Christianburg Garment* standard. They include filing duplicitous motions, knowingly joining wrong defendants, and continuing to prosecute despite numerous indicators of a meritless claim. *Arnold*, 719 F.2d at 66 (string cite of cases from other circuits). Fees may not be justified if a plaintiff's case is based on past evidence of racial or religious slurs, past disparate treatment, previous encounters with the same supervisor, or a subjective good faith belief in the merits of the claim. *Id. But see Christianburg Garment Co.*, 434 U.S. at 421 (plaintiff's bad faith is not a prerequisite for attorney's fees). The Eleventh Circuit identifies three key factors determining whether a plaintiff's case is frivolous. They are: 1) whether the plaintiff established a prima facie case; 2) whether the defendant offered to settle; and 3) whether the trial court dismissed the case prior to trial. *Sullivan v. School Bd.*, 773 F.2d 1182, 1189 (11th Cir.1985).

In this case, defendants assert that plaintiff's claim justifies an award of attorney's fees. They note that plaintiff failed to present any direct evidence of discrimination or retaliation, relying solely on the fact that he received below average pay increases for several years prior to his suit. However, the evidence conclusively showed that plaintiff's failure to produce external research grant money - one of several factors determining the level of ODU faculty salary increases - throughout much of the past decade accounted for his low salary increases. Defendants contend that plaintiff knew of this explanation for his low pay raises, but continued to pursue his claim nonetheless.

In response, plaintiff notes defendants' efforts over the past two years to reach an out-of-court settlement. Plaintiff filed

and later nonsuited two separate actions against defendant ODU before filing the current action. He filed the first action on May 3, 1996, and after that action was voluntarily dismissed on October 22, 1996, he filed a second claim on January 21, 1997. The second claim was dismissed on April 27, 1998, and immediately refiled against the current defendants. From the date of plaintiff's first action through the conclusion of the current suit, the parties communicated periodically about the possibility of settling their dispute out of court. They also discussed mediation as an alternative to legal action. In addition, ODU unilaterally raised plaintiff's salary by $5,000 in September, 1996, and again by $5,000 in December, 1996. Plaintiff argues that the seriousness with which defendants pursued these alternatives to litigation contradicts their current assertion that plaintiff's claim was frivolous.

In addition to defendants' settlement efforts, plaintiff argues that his case, to some extent, relied on a good-faith interpretation of the law. Plaintiff offered two reports - a 1996 report by the Asian/Asian-American Advisory Council and his own 1998 study - that allegedly demonstrated a pattern and practice of discrimination against foreign-born faculty at ODU. If a plaintiff establishes that a defendant engaged in a pattern and practice of discrimination, the burden is on the defendant to show by clear and convincing evidence that its actions against the plaintiff were not racially motivated. *Evans v. Harnett County Bd. of Educ.*, 684 F.2d 304, 307 (4th Cir. 1982). However, soon before the hearing on defendants' summary judgment motion, the Fourth Circuit ruled that a private, non-class action plaintiff cannot bring a pattern and practice claim. *Lowery v. Circuit City-Stores, Inc.*, 158 F.3d 742, 759 (4th Cir. 1998). Plaintiff asserts that *Lowery* reduced the merit of his claim by preventing him from relying on the generous *Evans* standard, and that the court should consider *Lowery*'s impact when judging the reasonableness of his claim. *See Christianburg Garment Co.*,

434 U.S. at 421-22 (warning courts not to engage in "post hoc reasoning" when considering whether attorney's fees are appropriate because occurrences during the course of litigation, such as a change in the law, may make a suit that was reasonable at its outset appear groundless). Finally, plaintiff asserts that defendants present no evidence that his suit was improperly motivated or that he lacked a good faith belief in the merit of his claim.

The court finds, based upon the Fourth Circuit precedent cited above and the Eleventh Circuit's three-factor Sullivan test, that plaintiff's claim does not meet the *Christianburg Garment* standard. It is true that plaintiff produced no direct evidence of discrimination or retaliation. However, plaintiff did offer indirect proof, pursuant to the framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Plaintiff produced evidence of his below-average salary increases, and he tried to bolster his claim with the two reports discussed above. While this collection of circumstantial evidence established, at best, a weak prima facie case, and entirely failed to raise a genuine issue of material fact with respect to defendants' non-discriminatory explanation for his low pay raises, it elevated plaintiff's claim above the level of pure speculation or conjecture. In addition, plaintiff relied, in part, on the good-faith legal argument that the *Evans* standard should apply to his claim. The Fourth Circuit did not rule conclusively on that issue until days before the summary judgment hearing. Finally, the parties' settlement negotiations prior to and during plaintiff's case further indicate that an award of attorney's fees would not be appropriate. In short, plaintiff's claim, while lacking merit and failing to raise any genuine issue of material fact, was not obviously "frivolous, unreasonable, or groundless." Accordingly, defendants' motion for attorney's fees is DENIED.

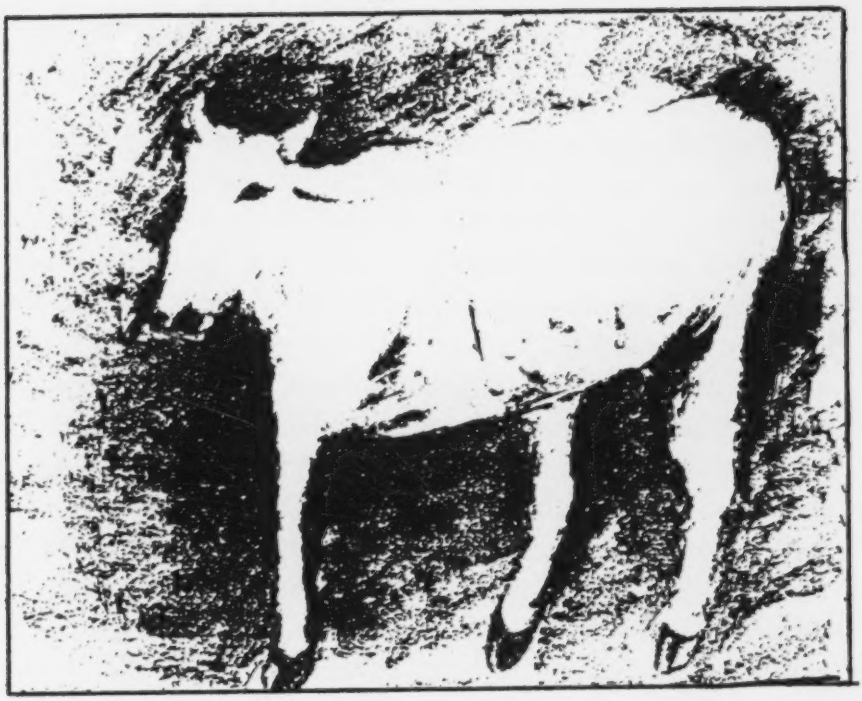
The Clerk is DIRECTED to send a copy of this Opinion

and Final Order to counsel for the parties.

IT IS SO ORDERED.

/s/ Rebecca Beach Smith
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
February 11, 1999



APPENDIX E: Symbolic Representation of Current Law (Rear legs represent option oftrial-by-jury or trial-by-judge; front leg represents Rule 56)